at $230 per month arose replacing the earlier monthly tenancy of $220 per month.

Appellant claims protection of the Ordinance. However, under section 15(1)(a) he would lose that protection if at the date of the notice terminating the tenancy he was in arrears of rent for 21 days or upwards after demand in writing and there was no tender thereof at or before such date. Section 15(1)(a) reads:—

"15.—(1) No order or judgment for the recovery of possession of any premises comprised in a tenancy shall be made or given except in the following cases, namely—

(a) where at the date of the notice determining the tenancy given by the landlord, rent lawfully due was in arrear for twenty-one days or upwards after demand in writing and there was no tender thereof at or before such date."

Before giving appellant notice to quit dated December 4, 1970 respondent had demanded payment by a notice in Chinese dated November 6, 1970. The demand does not have to be couched in any particular form. Appellant said he tried to make payment soon after he received the notice of demand but respondent refused to accept. Respondent denied that appellant had made such payment as he would have accepted it if it was made soon after the notice of demand as he was then in need of money. The truth is that payment was made after respondent sent appellant the notice to quit. By letter dated December 24, 1970 appellant, through his solicitors, attempted to tender the arrears but they were not accepted. The learned judge did not believe appellant tendered the arrears of rent soon after he received the notice of demand and respondent refused them. For by that time rent was already in arrears for more than 21 days.

For reasons given, the appeal is dismissed with costs here and in the court below.

Appeal dismissed.

Solicitors: *Ibrahim & Co.; Reddi & Co.*

CHU LIP KONG v. DIRECTOR-GENERAL OF INLAND REVENUE

[F.C. (Lee Hun Hoe C.J. (Borneo), Ong Hock Sim F.J. and Charles Ho J.) October 3, 1977 and June 19, 1978]

[Kota Kinabalu — Federal Court Civil Appeal No. 56 of 1977]

Revenue Law — Income tax — Profit from sale of land — Land suitable for timber extraction — Whether profits income or capital appreciation — Deductions — Sabah Income Tax Ordinance, 1956, s. 12(1).

The appellant an extractor of timber, had originally bought a piece of land for $320,000. He applied for a timber licence but subsequently had the licence cancelled. The property was then sold to one Chin Yin Kee for $580,000 and on the same day Chin Yin Kee sold it to Kim Hong Co. Ltd., for $595,000. Thereafter the land was worked as a timber concession by Kim Hong Co. Ltd. The Special Commissioners disbelieved the sale of the property to Chin Yin Kee. Revenue claimed that the appellant had made a profit of $176,774 from the transaction and charged the taxpayer to tax on this sum as income derived from trading in timber. The appellant appealed to the Special Commissioners and the High Court on the ground that this sum represented capital appreciation and not income and was therefore not chargeable to tax. The Special Commissioners and the High Court dismissed the appeal and the appellant appealed to the Federal Court.

Held, dismissing the appeal: (1) there was ample evidence before the Special Commissioners to come to the finding that the difference in the consideration was not a capital appreciation but a profit arising from the taxpayer's trade and therefore chargeable to tax. The learned judge in the High Court also accepted this and it would be wrong for the court to come to any other conclusion;

(2) because of the intervention of Chin Yin Kee, the Special Commissioners were correct in holding that the payment for commission, legal fees and transfer fees claimed as deductions by the appellant were not wholly and exclusively incurred in the production of the income.

FEDERAL COURT.

S. Woodhull (*Thomas Cheah* with him) for the appellant.

Datuk Eusoff Chin, Senior Federal Counsel, for the respondent.

Ong Hock Sim F.J. (delivering the judgment of the Court, read by Charles Ho J.): The appellant tax-payer bought on October 7, 1964, 6,666 acres (the Kinabatangan property) in Sandakan for $320,000. The price was at the very cheap one of about $50 an acre. The tax-payer was a man of many parts. Among his many roles, he was a cattle farmer as well as an extractor of timber. He said he bought the land for cattle rearing. He had another cattle farm somewhere which was subject to cattle thefts and he intended to transfer his cattle or some of them to this new property. He did nothing of that sort, because he found out that over 5,000 acres were subject to flooding and therefore unsuitable for cattle rearing. But this he found out more than a year after his purchase. However, on March 15, 1966 he secured a timber licence to work this property as a timber-land. He however caused it to be cancelled on October 26, 1966. There were no records of his ever having extracted any timber. On October 25, 1966, i.e. a day previous, he sold the property for $580,000 to Chin Yin Kee. $380,000 was paid on the same day. The balance of $200,000 was guaranteed by two persons, namely Tan Kim Ting and Liew Tze Nyen, by a cheque drawn by Kim Hong Co. Ltd. On the same day, Chin Yin Kee sold the land to Kim Hong Co. Ltd. for $595,000. Thereafter Kim Hong Co. Ltd. worked the land as a timber concession with the necessary licence and from 1967 to 1971 extracted a total of 1,573,400 cubic feet, mainly from the areas that were not subject to flooding.

The Special Commissioners disbelieved the sale of the property to Chin Yin Kee. They did so because there was an admission that the cheque of $200,000 used by Chin Yin Kee to pay the balance of the purchase price was the one issued by Kim Hong Co. Ltd. who was the eventual purchaser of the commercial timber on the property.

Revenue determined that the appellant had made a profit of $176,774 from the transaction and charged the tax-payer to tax on this sum as income derived from trading in timber. The tax-payer appealed to the Special Commissioners and the High Court on the ground that this sum represented capital appreciation and not income and was therefore not chargeable to tax.

Learned counsel for the appellant did not seriously contend against the findings of fact by the Special

Commissioners but contended that these facts established clearly a case of capital appreciation. But on the evidence the tax-payer was more a timber man than he was of any of his other occupations. From his own accounts for the years 1964 to 1966, 90% of his income was derived from timber operations. Whatever his stated reasons for the purchase of the property might be, there was no evidence that he carried out in any way his projected cattle rearing on the property. From the figures supplied by Kim Hong Co. Ltd., there could be no doubt of the suitability of the property as a logging concession. There was also some timber in the parts subject to flooding. The tax-payer had applied for and obtained a timber licence. His surrender of it was in conformity with the law, since under the Forest Ordinance 1954 and the Forest Rules 1954, such a licence was not transferable and the only way Kim Hong Co. Ltd. could work the land for its timber would be to apply for a licence in its own name and he could only do that after the tax-payer had surrendered his licence. On the evidence it was a possible conclusion that the sale to Chin Yin Kee was a colourable device and that the sale was one to a logging firm. There was ample evidence before the Special Commissioners to come to the finding that the difference in the consideration was not a capital appreciation but a profit arising from the tax-payer's trade and therefore chargeable to tax. The learned judge also accepted this and it will be wrong for this court to come to any other conclusion.

The last question concerned the sum of $23,703 made up of $11,600 commission, $500 legal fees and $11,603 transfer fees. Because of the intervention of Chin Yin Kee, the Special Commissioners were not satisfied that the sum was wholly and exclusively incurred in the production of the income: Section 12(1) Sabah Income Tax Ordinance 1956, to qualify for deduction. We agree.

The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Chong Thian Vun & Co.*

NAM SENG CO. v. WING YEW (TAWAU) CO. SDN. BHD.

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo), and Chang Min Tat F.J.) April 24 and June 19, 1978]

[Kota Kinabalu — Federal Court Civil Appeal No. 218 of 1977]

Contract — Assignment of forest licence — Breach of Enactment — Illegal and void — Forest Enactment, 1968 — Forest Rules, 1969.

In this case the appellant who was the third plaintiff in the civil action claimed to be the assignee of a forest licence granted to first defendant. The respondent was similarly an assignee whom the first defendant, the licensee, purported to substitute in place of the appellant. The appellant and two others had sued the respondent and two others and the respondent had applied for the writ of summons and the action to be dismissed on the ground, *inter alia*, that the claim was based on an illegal contract. The learned judge was of the opinion that the assignment of the licence was in breach of the Forest Enactment 1968 and the Forest Rules 1969 and therefore illegal and void. He therefore made the order dismissing the action. The appellant appealed.

Held: dismissing the appeal, the learned trial judge was correct in holding that the purported assignment of the forest licence was illegal and void and therefore that the action should be dismissed.

Cases referred to:-

(1) *Finnegan* v. *Cementation Co. Ltd.* [1953] 1 All E.R. 1130.

(2) *Pontin* v. *Wood* [1962] 1 All E.R. 294.

(3) *Lo Su Tsoon Timber Depot* v. *Southern Estate Sdn. Bhd.* [1971] 2 M.L.J. 161.

FEDERAL COURT.

W.K. Loo for the appellant.

Shelley Yap for the respondent.

Lee Hun Hoe C.J. (Borneo) (read by Charles Ho J.): This is an appeal against an order made by the learned judge that the writ of summons and service thereof and all subsequent proceedings against respondent/3rd defendant be set aside and the action dismissed with costs to be taxed on the ground of illegality.

Syarikat Perjuangan Sdn. Bhd. (1st defendant) were granted a licence No. 14/71 issued by the Sabah Government on November 1, 1971 covering a concession area of 20,000 acres in the Bongaya Forest Reserve, Sandakan. Datuk Chang Hwee Ming (1st plaintiff) is the Chairman and Managing Director of Nam Seng Co. Sdn. Bhd. (2nd plaintiff) and also the sole proprietor of Nam Seng Co. (appellant/3rd plaintiff). On April 10, 1972 1st defendant executed three documents. The first is the Power of Attorney ("old P/A") in favour of 1st plaintiff which was registered in the Magistrate's Court, Sandakan on April 11, 1972 as No. 276/72. The "old P/A" empowers the 1st plaintiff to do certain acts and things on behalf of 1st defendant under the licence. The second is the Timber Extraction Agreement ("old T.E.A.") whereby 1st defendant employed 2nd plaintiff to extract all merchantable timber from the concession area. The third is the Timber Sale Agreement ("old T.S.A.") whereby 1st defendant agreed to sell all merchantable timber extracted from the concession area to 3rd plaintiff. On August 20, 1975 the 1st defendant company at the meeting of its board of directors passed a resolution terminating the "old P/A" and determining the "old T.E.A."

Under the "old T.E.A." 2nd plaintiff had extracted timber from an area of 9,000 acres in 1975. In the exercise of the powers under the "old P/A" 1st plaintiff had applied to the Forest Department for a further area for extraction of timber. A permit to enter Coupe No. S-43/74 was issued by the Forest Department on March 20, 1975 to 1st defendant to enter the Coupe consisting of 3,660 acres in the concession area and valid for a period of 3 years. The 1st plaintiff obtained the permit in order to allow 2nd plaintiff to continue with the extraction under the "old T.E.A." Upon the issue of the said permit, 2nd plaintiff had caused the area to be surveyed, divided the Coupe area into blocks, constructed roads and pangkalangs thus incurring expenses totalling $159,960. 1st defendant executed another Power of Attorney ("new P/A") in favour of 3rd defendant on August 30, 1975 and also entered into a new Timber Extraction Agreement ("new T.E.A.") to extract timber from the concession